

CITY OF LOS ANGELES

CALIFORNIA

CITY ETHICS COMMISSION

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CITY ETHICS COMMISSION

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CITY HALL - 24TH FLOOR
LOS ANGELES, CA 90012

By Fax

September 3, 2002

Chairman Karen Getman
Commissioners Sheridan Downey III, Thomas S. Knox and Gordana Swanson
Fair Political Practices Commission
428 J Street, Sixth Floor
Sacramento, CA 95814

Re: Petition to Reconsider August 9th Action on Regulation 18531.7(e)

Dear Commissioners:

In the wake of the decisions you made at your August 9th meeting to permanently adopt member communication Regulation 18531.7, you now have received a petition from several labor unions to amend that regulation. We understand that a discussion of that petition will occur at your meeting on September 5 under Agenda item 3. The proposed amendment, in part, would reverse the conclusion you reached last month that a member communication which is *behested* by a candidate is a *contribution* to that candidate. The City Ethics Commission urges you to not abandon that conclusion.

At issue is the interpretation of key components of California Government Code § 85312, which provides that certain payments for communications to "members, employees, shareholders, or families of members, employees, or shareholders of an organization" are not contributions or expenditures. As we stated in our letter of August 8th (copy attached), the conclusions you reached in defining the scope of § 85312 limit what otherwise could have meant the erosion of meaningful campaign finance reforms that have been enacted in the state. Other alternative interpretations would have created significant new loopholes and undermined the success of those reforms.

We applaud the Commission's action last month to adopt Regulation 18521.7(e) in a manner consistent with the longstanding treatment of all other political payments that are made at the behest of a candidate. As you know, Government Code § 82015 provides that a payment "made at the behest" of a candidate is a "contribution" to the requesting candidate.

FPPC Chairman Getman and Commissioners Downey, Knox and Swanson
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In a letter to the Commission dated August 27, 2002, State Senator John Burton, one of the co-authors of Prop. 34, indicated that "it was not my intention to change the FPPC's long standing regulation defining the term 'contribution,' including payments made at the best of candidates. If payments are made at the behest of a candidate, normally the payments would constitute a contribution to that candidate unless otherwise exempted." Although his letter accurately states that § 85312 carved out an exemption that would not treat "member communications" as contributions, it does not clearly indicate whether he believes that candidate-behested payments fall within that exemption. His support of reconsideration appears, rather, to relate to the definition of the term "member."

We believe that the conclusion the Commission reached on this point last month was the correct one. Concluding otherwise would reverse a longstanding and legitimate treatment of behested payments as contributions, which are and should remain subject to valid contribution limits. Concluding otherwise would create a system in which candidates could use third-party resources *under their control, at their direction, and with their cooperation*, to completely avoid any limits whatsoever on the use of those resources. As a result, the contribution limits voters thought they had secured in California, and in local jurisdictions like Los Angeles, could be effectively gutted.¹

Should the Commission feel that it is necessary to schedule a discussion of the merits for its October meeting, we would request that our comments also be included as part of the record at that time as well.

Thank you for your ongoing efforts to clarify these challenging provisions and for the opportunity to comment.

Sincerely,



LeeAnn M. Pelham
Executive Director

Attachment

¹ It remains our position, as expressed in previous letters to the Commission that, as a charter city, under Article XI, section 5 of the California Constitution and decisions of the California Supreme Court, the City of Los Angeles campaign finance regulations would not be preempted by these regulations.

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August 8, 2002

The Honorable Karen Getman
Fair Political Practices Commission
428 J Street, Sixth Floor
Sacramento, CA 95814

Re: Proposed "Member Communication" Regulation 18531.7

Dear Chairman Getman:

I had hoped to attend your meeting tomorrow on behalf of the Los Angeles City Ethics Commission, but I will be unable to do so. In lieu of providing oral testimony tomorrow on proposed Regulation 18531.7, I respectfully request that you share these written comments with the other members of the Commission as you consider how that draft regulation should address several issues raised by Section 85312, relating to the "member communications" exemption of Prop. 34.

As your July staff memo indicates, the action you may take tomorrow to adopt language interpreting the 'member communications' exemption of Prop. 34 will embrace one of two approaches: narrow the scope of the exemptions created by the member communications provision; or broaden the scope of those exemptions by interpreting the provision to apply to an even wider range of persons and activities. As your staff memo also notes, "[w]hile the Commission has made several critical interpretations at the March [2002] meeting, which built on the foundation of determinations made in the prior year, the Commission asked staff to reexamine the draft regulation in light of lingering questions regarding the scope and implementation of the statute." How these questions are answered will have great consequence. In defining the scope of this provision, the FPFC's actions will either support curbs on the erosion of meaningful campaign finance reforms where they have been successfully implemented in the state, or they will simply create significant new loopholes that will undermine those successes.

As you know, the City of Los Angeles has the authority as a charter city to enact comprehensive campaign finance reforms that include a public matching funds program. It remains our position, which we believe is supported by Article XI, section 5 of the California Constitution and decisions of the California Supreme Court, that our program is not preempted by state law and that the City may enact elements of our program even if they appear to conflict with provisions of the Political Reform Act or the regulations of your Commission. Nevertheless, we believe that the latest staff draft of Regulation 18531.7 deserves comment because it could impact our program by resulting in confusion with regard to the issues this letter discusses. Our specific comments are outlined below.



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- **Decision 3 – Sec. 18531.7 (a) - Should payments “to” a membership organization be treated as “payments” that are exempt under § 85312?**

Payments “to” an organization should not be so treated. The purpose for which this section was designed is to allow bona fide member organizations to communicate with its members on political matters. That purpose is sufficiently served by exempting the payments *made by* the organizations for communications to its members. More importantly, however, treating payments “to” organizations as exempt would allow persons to pass unlimited contributions through an organization in an attempt to influence voters, thus circumventing lawful contribution limits. Exempting payments “to” an organization for member communications simply creates an incentive for those who wish to use large or unlimited funds to influence a campaign to avoid complying with a jurisdiction’s legitimate contribution limits. We would urge you to reject the bracketed language, [“or to”], in subsection (a), line 5.

- **Decision 2 – Sec. 18531.7(a)(3) - Should “member” be defined to include a person who simply makes a contribution to a political “committee?”**

It appears from the draft Regulation that the question of whether a political “committee” as defined in the Political Reform Act is not a decision that the Commission has been asked to consider at its meeting tomorrow. Assuming, therefore, that the Commission has previously adopted this approach in concept, it is our view that the term “member” should *not* include a person who simply makes a contribution to a “committee.” Instead, “member” should be defined as originally intended by the voters, namely as persons who have a substantial relationship to an organization, such as someone who identifies as a member, pays membership dues and/or participates in the governance of the organization.

A more significant problem arises, however, due to the proposed treatment of a “committee” as a membership organization.

As drafted, it is not clear whether the proposed exclusion of a “candidate” from the definition of “organization” in Subsection (a)(1) at line 14 also includes the candidate’s *controlled committee*. The Los Angeles City campaign finance program, for example, provides public matching funds to a candidate and his or her committee if the candidate agrees to limit his or her campaign expenditures in the race. Expenditures covered by the limitation include those that a candidate incurs in communicating with voters for the purpose of influencing or attempting to influence the voters to support the election of that candidate. Defining “members” as contributors to a committee would allow a candidate who receives public matching funds in exchange for abiding by a spending limit to avoid having to comply with that spending limit because it would not count those communications expenditures as subject to the limit. Defining the term in this way, therefore, would undermine the heart of this successful approach to campaign finance reform. If this was not the staff’s intention in crafting the draft Regulation, the matter can easily be clarified by simply having the Regulation say that.

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- **Decision 4 – Sec. 18531.7 (e) - Should payments to an organization for member communications that are "behested" by a candidate be treated as "contributions" (and therefore be subject to limit) or *not* be counted as "contributions"?**

Draft Regulation 18531.7 (e) requires the Commission to determine whether, for purposes of Section 85312, a "behested" member communication to support or oppose a candidate or ballot measure should be counted as a "contribution."¹

We would strongly urge the Commission to reject Options B and C,² and to adopt Option A to ensure that a behested payment is considered a contribution to the behesting candidate or committee. To do otherwise will promote the circumvention of lawful contribution limits by encouraging the use of large or unlimited contributions to finance member communications that are made *precisely under the control or at the direction of, in cooperation, consultation, coordination, or in concert with the candidate*. To increase the importance of such contributions to candidates is likely to only increase the potential for perceived or actual corruption, and therefore undermine legitimate contribution limits where they do exist.

We appreciate the opportunity to provide comment and we thank you for your consideration of the issues discussed in this letter.

Sincerely,



LeeAnn M. Pelham
Executive Director

¹ As you know, the PRA defines "made at the behest of" to mean made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Section 82015 provides that a payment "made at the behest" of a candidate is a contribution to the requesting candidate.

² We note that Option C would not treat a behested payment for a communication as a contribution if the "communication" (presumably its text) is created by the member organization. Who writes the text of a communication is simply not relevant to whether the payment should be treated as a contribution. Under the Act generally, a behested payment is treated as a contribution because it is made at the request of the candidate. There is no logical or policy reason to treat such payments differently in this context than it is treated in all other contexts.